

NO. 811

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

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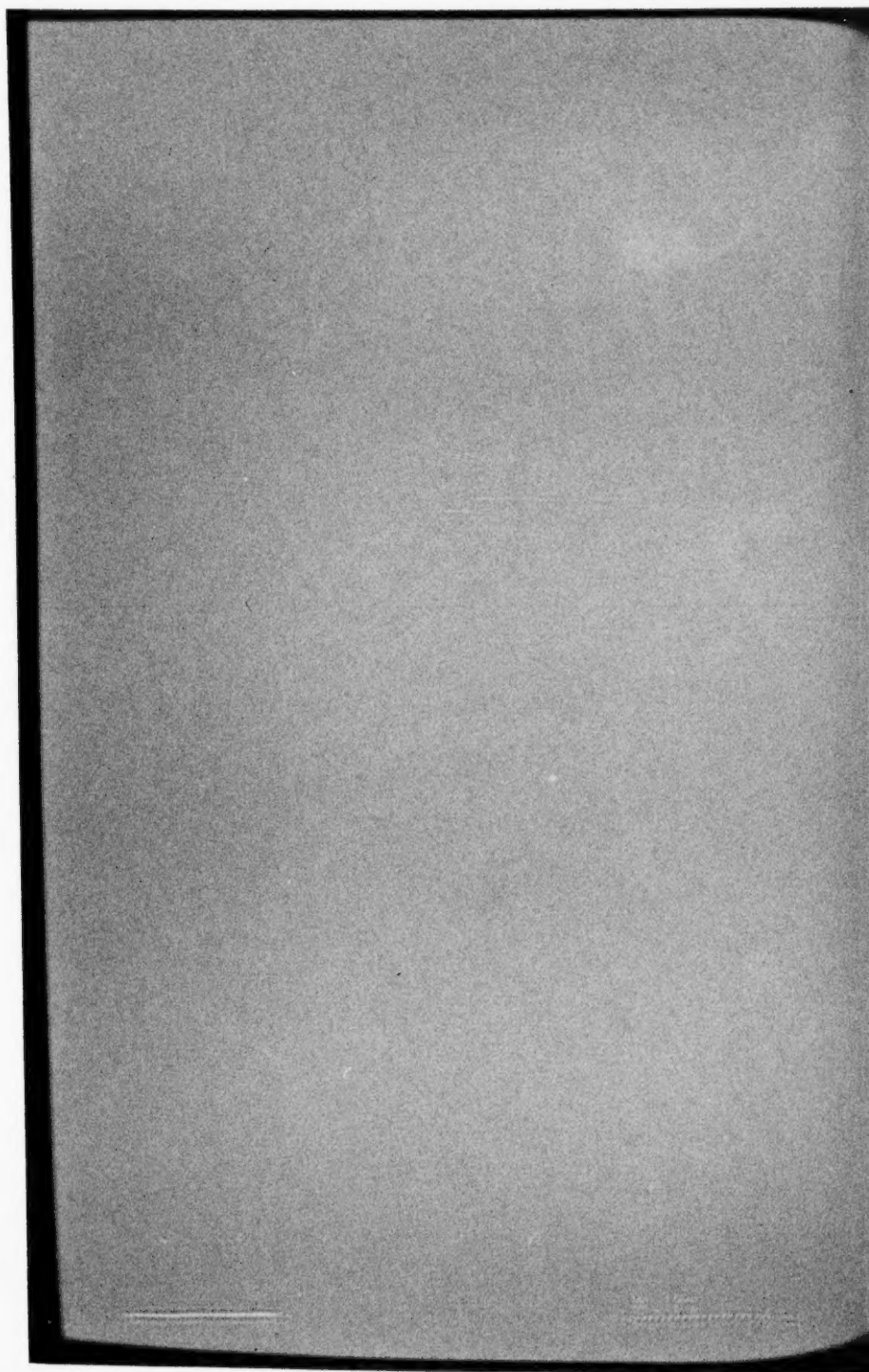
PORTLAND GENERAL ELECTRIC COMPANY,
a Corporation,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.

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To the Supreme Court of the United States:

The petitioner, Portland General Electric Company, relying upon Title 28, Sec. 347, U. S. C. A. (Sec. 240 of the Judicial Code) to sustain the jurisdiction of this Court, respectfully shows to this Honorable Court as follows:

The petitioner owns, operates and maintains an electric power submarine cable, which, pursuant to authority duly granted, crosses the Willamette River in Portland, Oregon, and is used to supply electric energy to petitioner's customers. The cable is attached to connections on each bank of the river and between said connections lies loosely on the bed of the river with sufficient slack in it to permit its

being raised to the surface as occasion may require for examination or repairs.

The "*B. F. Shaw*", a merchant vessel owned by the respondent, while manuvering in the Willamette River, negligently dragged its anchor under or across said cable with the result that it was ruptured and destroyed, to petitioner's damage in the sum of \$25,000.00.

Petitioner filed a libel in the District Court of the United States for the District of Oregon which was amended in certain particulars so that the matter finally came before the District Court on exceptions to the second amended libel. The ground of these exceptions was that the cause was not within the Admiralty jurisdiction, since the cable was, so the exceptor stated, a land structure. The court sustained the exceptions and entered a decree dismissing the libel, which decree was later affirmed by the Circuit Court of Appeals for the Ninth Circuit in a Per Curiam decision filed May 8, 1944.

It is to review that decision that petitioner now seeks a writ.

THE REASON RELIED ON FOR THE ISSUANCE OF THE WRIT IS: That this is an important point of Admiralty jurisdiction on which the courts in the different circuits are at variance and it is in the public interest that it be settled, all as will be more appropriately stated in the Brief attached to this petition.

Wherefore your petitioner respectfully prays that this Honorable Court will issue its writ of certiorari

to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify the record in this cause for review and decision by this Court of the question involved.

And your petitioner will ever pray.


 ERSKINE WOOD,

1310 Yeon Building,
 Portland, Oregon.
Proctor for Petitioner.

Dated July 18, 1944.

I, Erskine Wood, hereby certify that the foregoing petition is in my opinion well founded in law, and not interposed for delay.


 ERSKINE WOOD.

BRIEF

In *Bell Telephone Company of Pennsylvania vs. United States of America* (as owner of steamship *Cavalcade*), 1943 A. M. C. 220, the Court succinctly states the split in the authorities as follows:

"Jurisdiction, having been contested, has been retained in the following causes having to do with submarine cables:

"Postal Telegraph Cable Co. vs. P. Sanford Ross, Inc., 1915, 221 Fed. 105 (EDNY); *New York Telephone Co. vs. Cities Service Trans. Co.*, 1938 A. M. C. 775, 23 Fed. Supp. 426 (EDNY); *United States vs. North German Lloyd* (1917), 239 Fed. 587 (SDNY); *The Toledo* (1917), 242 Fed. 168 (DNJ); *United*

States vs. SS Majestic, Oceanic Steam Navigation Co., Ltd., 1932 A. M. C. 1079 (SDNY); *United States vs. Tug Williams*, 1941 A. M. C. 1588 (SDNY).

"Jurisdiction has been denied in:

"Nippon Yusen Kabushiki Kaisha vs. Great Western Power Co., (9CCA), 1927 A. M. C. 410, 17 F. (2d) 239; Certiorari denied, 274 U. S. 745; *Westfall Larson & Co. vs. Allman-Hubble Tug Boat Co.*, (9CCA), 1934 A. M. C. 1442, 73 F. (2d) 200; *The Mont Agel*, 1924 A. M. C. 401 (E. D. La.); *Postal Telegraph-Cable Co. vs. The Cananova*, 1942 A. M. C. 281 (SD Fla.)."

With a good-humored thrust at the government's chameleon-like changes—asserting the jurisdiction in one case, and challenging it in the next, as interest serves—the Court adds:

"Catholicity of approach has characterized the attitude of the government in such cases, since in three of those cited in the first group it has successfully appealed to that jurisdiction which it now asserts to be non-existent. The cause against *The Majestic*, the fifth in the list, was presented to the Southern District Court five years after the decision of the Nippon Yusen case in the 9th Circuit, to which the government now yields elaborate deference in behalf of the pending exceptions.

"It seems rather late in the day to reopen a question which has been deemed to be at rest in the Eastern and Southern Districts for a matter of twenty-seven years, the *Postal Telegraph Cable Co. vs. P. Sanford Ross, Inc.*, *supra*, having been decided in 1915."

Turning now from the foregoing quotation, we briefly analyze the cases in the above list. We take them chronologically, without regard to whether they were for or against the jurisdiction.

Postal Telegraph Cable Co. vs. P. Sanford Ross, 221 F. 105 (1915), was a submarine cable, ruptured by a dredge. The Court said the test of jurisdiction was whether or not the cable was a *structure* on land. It concluded that it was not such a structure. The fact that it was a telegraph, rather than a power cable, was not a deciding factor. The decision was rested on the holding that the cable was not a land structure. As this case was the leading authority in the New York Districts, and has been followed there ever since, we quote the pertinent part of the opinion.

"The cases above cited, in which jurisdiction has been assumed for such an accident, seem to have been based upon the theory that the location of the cable was within the limits of navigable waters, that the injury had to do with the operations of navigation, that the cable itself was connected with the subject of navigation when occupying some portion of the navigable channel, and that the injured object (the cable) was not a structure on the land, nor affixed thereto as a part thereof.

"The result of the force exerted by the anchor must have been to have raised the cable from the bed of the channel, and to have dragged it along through the water. The accident, therefore, occurred within the physical limits of admiralty jurisdiction, it was occasioned by the operations of the anchor

and the handling of the boat, and the cable itself is akin rather to matters connected with the ocean than to those of the land, although it was supported at each end upon the shore, and, for the purpose of transmitting an electric current, has no closer relation per se to navigation than would a wire crossing over a stream, in the air, and which was employed to transmit news as to ships, etc. The cable is further like a beacon or buoy, in that it is merely located at the spot, even though attached to the land at each end.

“Assuming that no jurisdiction in admiralty exists under the United States Constitution over the actual sustaining of damage (and apart from the cause), unless the object damaged be on the water, or within its body, rather than on land, that is, a part of the land (The Plymouth, *supra*), let us consider whether this cable was a fixture so attached to the land as to be a part thereof, and in that sense a “structure” on shore.

“If the telegraph company had maintained some wires across the river, in the air, and also some wires on a bridge just over the cable, the cases cited show that any injury to the bridge, or the wires on the bridge, or in the air, would not give jurisdiction to the admiralty court, even if messages were alternately sent over the wires above and below water. If a platform for dredging had been located on piles in the water, an injury thereto by a boat would likewise occur on the land, as distinguished from the locality covered by the maritime jurisdiction (The Poughkeepsie, *supra*, and the case of

N. Y., N. H. & H. Tug Transfer No. 5 v. The R. J. Moran, therein cited).

"But suppose an injury were caused to the Atlantic cables on the high seas, by a steamer, could it be held that, because the cable had a landing on shore, it was a land fixture, and was not an object wholly within the maritime jurisdiction, where it lay supported by the bottom and not by its own buoyancy? If so, no damage by a boat to a sunken dry dock or vessel could lie in admiralty, if there were a shore mooring, and if it could not *at the time* be navigated.

"The case is not analogous to those where the maritime character of the object has been entirely lost, such as the case of a boat turned into a boat-house and solidly fastened to the shore. *Woodruff v. One Covered Scow* (D.C.), 30 Fed. 269.

"This case has been fully tried, subject to the objection as to the jurisdiction of the court over the cause of action, and to relegate the libelant to another court, and a new action, should not be the result unless the court is plainly without any authority to dispose of the issue raised upon the testimony. No part of the injury occurred beyond the limits of the tidewater, nor was the connection to the shore of any sort other than to insure a permanent passage of the current. There might even be instances where such a cable would not be carried to the shore, but rather (by induction or wireless) be used to transmit vibrations as a step in signaling. If the mere fact that it does not float, and rests on the bottom, makes an object a land fixture and structure, no admiralty

court could entertain a suit for injury by a boat or anchor to a grounded vessel. While the converse case, of injury by a cable suspended in the water or lying on the bottom, has been treated as an admiralty matter (see cases cited, *supra*), for there the injury occurred on the *maritime* object, yet the objection raised to the present case is fatal, if the injured cable was not wholly the object of admiralty jurisdiction.

"Any argument drawn from the results of the situation presented of necessity begs the question, and yet full discussion is necessary to reach the primary determination. But as the court is of the opinion that a submarine cable of this sort is not a *structure* (Court's italics) on the land and affixed thereto as an extension of the shore (208 U. S. at page 321, 28 Sup. Ct. 414, 52 L. Ed. 508, 13 Ann. Cas. 1215), even though connected therewith as an aid to land commerce, it is therefore subject to maritime control.

"The plea to jurisdiction must be overruled, and the libelant may have a decree."

In *United States vs. North German Lloyd*, 239 Fed. 587 (1917), certain government cables in New York Harbor were injured. The government (contrary to its position in the present case) asserted the admiralty jurisdiction. The Court, following the Postal Telegraph Case, sustained the government's claim.

The pertinent part of the opinion follows:

"These facts require a finding that the Princess Alice was negligently grounded and afterward

floated in a negligent manner, resulting in injury to the cables in question, and will warrant a decree for the libelant unless the respondent's claim that admiralty has no jurisdiction be sound.

"The case of *Postal Telegraph Cable Co. vs. P. Sanford Ross* (D.C.), 221 Fed. 105, settles this claim adverse to the respondent unless it can be said that this rule was not approved in *The Raithmoor*, 241 U. S. 166, 36 Sup. Ct. 514, 60 L. Ed. 937. Judge Chatfield in the former case decided that a dredge coming in contact with a submarine telegraph cable crossing a tidewater navigable channel and resting on the bottom, although fastened on shore at each end for connection with land wires, was responsible in admiralty for damages inflicted on such cables due to the negligence of the dredge, holding that, where a cable lies in the bottom of a channel, it is within the admiralty jurisdiction and is maritime.

Counsel for respondent argues, however, that this rule was not approved in the later *Raithmoor* Case, while the case of *Postal Telegraph Co. v. Ross* was cited to the Supreme Court. It is not discussed in the opinion, nor is it disapproved. In the *Raithmoor* Case, a libel was filed in rem against the steamship *Raithmoor* to recover damages for tort due to the steamship while coming up the Delaware river, coming in contact with scow or pile driver and a structure then being erected by the United States government to serve as a beacon and with a temporary platform used in connection with the work of construction. The Supreme Court held, reversing the

District Court, that jurisdiction in admiralty existed under these facts. The Court said:

“We regard the location and purpose of the structure as controlling from the time the structure was begun. It was not being built on shore and awaiting the assumption of a maritime relation. It was in course of construction in navigable waters, that is, at a place where the jurisdiction of admiralty in cases of tort normally attached—at least in all cases where the wrong was of a maritime character.”

“As I read this decision, I do not think it essential that the object injured should itself be an aid to navigation before liability attached in admiralty. Its location is controlling, and if, by reason of its location, it has a maritime relation, it is within the admiralty jurisdiction.

“Since the injuries had to do with the operations of navigation, and the cable itself was connected with the subject of navigation, when occupying some portion of the navigable channel, and was not a structure on land nor affixed thereto as a part thereof, I am of the opinion that admiralty has jurisdiction, and for these reasons will grant a decree in favor of the libellant.”

In *The Toledo*, 242 Fed. 168 (1917), a submarine telegraph cable was damaged. The New Jersey District Court upheld the admiralty jurisdiction. After reviewing the authorities, the court said:

“It would seem that the cases cited above were, on principle, correctly decided. When a vessel on the high seas or navigable waters of the United States commits a tort by negligently injuring a cable, the

contention that the cable was lying on the bottom of the river or sea, and the ends thereof ultimately reached the land, and therefore admiralty does not have jurisdiction, ought not prevail, when all the other elements necessary to constitute a maritime tort are present.

"The exceptions will therefore be dismissed."

The *Mont Agel*, 1924 A. M. C. 401 (1924), did damage to a submarine telegraph cable. The District Court, Eastern District of Louisiana, denied jurisdiction, without opinion.

As we read the foregoing decisions, the fact that in some or all of them the cable was a telegraph cable and, therefore possibly sometimes used for transmitting messages in regard to ships, was not a factor in the decision, but rather, the decision was based simply on the ground that the cable was not a land structure. The phrase used in some of these decisions that the cable is "connected with the subject of navigation" we take to mean merely that it is located in navigable water. Indeed, this seems to be the interpretation put upon it in the next case which came up chronologically, *Nippon Yusen Kabushiki Kaisha vs. Great Western Power Co.*, 17 Fed. (2d) 239 (1927).

This was a power cable. The court, after referring to the telegraph cable cases, and stating its view that jurisdiction in those cases was doubtful, said:

"It is with even more difficulty that jurisdiction may be justified of claims for an injury committed to a cable used solely for the carrying of electric power. In the decisions in the

telegraph cable cases, where the judges say that the cable is 'connected with the subject of navigation', that expression can mean no more than that the cable is established in navigable water, unless the assumption is indulged that such cable has some use in navigation by the transmission of messages there-through to direct the course and movement of vessels. No such use can follow as an incident to the purpose of the power cable." (17 Fed. (2d) 241.)

This is the first case, we believe, which suggests any possible distinction between a power cable and a telegraph cable, and this suggestion is what appears to have induced the district courts of New York to distinguish their later decisions from the Nippon Case by mentioning that the cable in question was a telegraph or telephone cable,—a distinction not present in their earlier decisions. Indeed, the Nippon case, itself, did not make that distinction, but merely hinted at it as a possible one. Even the Nippon case, which is the chief authority against us, while denying the jurisdiction, went on to say that the day might come, with expanding commerce, when the Admiralty jurisdiction would have to be extended to cover these cases. We refer to the following paragraph in the opinion:

"Perhaps in the expanding scope of the industries, and the adoption of new methods and means for the transmission of power, with utilization of sea, river, and lake beds as supports for conduits and conveyances, it will be thought that a condition of business necessity exists as will justify the further extension of the admiralty jurisdiction, and perhaps the present case furnishes facts favorable to such an exten-

sion. In our view, however, to so declare the law to be is to mark a step beyond the admiralty field as we understand it to have been thus far established by the decisions of the Supreme Court."

We do not admit that the jurisdiction needs "extension". We think it already exists. But if there is any doubt about it, we believe the time has come to extend it as above forecast.

Further following the list of decisions cited in the beginning of this brief, and still following the chronological order, we come next to *United States vs. SS Majestic*, Oceanic Steam Navigation Co., Ltd., 1932 A. M. C. 1079, not otherwise reported. There the cables were "submarine cables connecting Fort Hamilton and Fort Wadsworth, and used solely for military fire control and harbor defense purposes." The court sustained the jurisdiction without opinion, but stated, during oral argument, that the cables should be regarded as aids to navigation and commerce;—it is difficult to see on what grounds.

We come next to *Westfall Larson & Co. vs. Allman-Hubble Tugman Co.*, 1934 A. M. C. 1442, 73 Fed. (2d) 200, in which the Circuit Court of Appeals for the 9th Circuit merely followed its previous decision in the *Nippon* case. Just as it has done in the instant case.

Next in order is *New York Telephone Co. vs. Cities Service Trans. Co.*, 1938 A. M. C. 775, 23 Fed. Supp. 426, where a telephone cable was damaged. The District Court for the Eastern District of New York

followed the earlier New York decisions and disposed of the Nippon Case by remarking that, in the case before him, the cable sometimes transmitted messages relating "to matters of maritime import", and that, "to that extent, the case is distinguishable from the Nippon Yusen Kabushiki Kaisha Case and comes squarely within the doctrine as laid down in the Postal Telegraph Cable Co. Case. Therefore, the court has jurisdiction in admiralty."

Then came *United States vs. Tug Williams*, 1941 A. M. C. 1588. There, in the Southern District of New York, the court, at the instance of the United States as libellant, sustained admiralty jurisdiction over injury to a telephone cable in New York Harbor, on the authority of *United States vs. North German Lloyd*, *supra*, and cases therein cited.

Next came *Postal Telegraph Cable Co. vs. SS Cananova*, 1942 A. M. C. 281, where the District Court for the Southern District of Florida denied jurisdiction over damage to a telegraph cable. There was no written opinion, but the statement in A. M. C. says that the court refused to follow the New York district courts and followed the contrary authorities.

In *Bell Telephone Co. of Pa. vs. United States*, as owner of the steamship *Cavalcade*, 1943 A. M. C. 220, the District Court for the Eastern District of New York followed the earlier New York decisions and sustained jurisdiction over damage to telephone submarine cables. The Court said:

"It is a permissible view that a cable is an adjunct to, rather than a prolongation or exten-

sion of, a structure on land, such as the pipe line which was held to be a necessary part of the plants of the oil company, in *The Russel No. 6* case, *supra*."

We understand that this case is now before the United States Circuit Court of Appeals for the Second Circuit, on a motion by the government for a writ, prohibiting the District Court from proceeding; and that one ground of the motion is the alleged lack of admiralty jurisdiction.

We believe the foregoing are all the cable cases which have come before the courts, until we come to the case at bar. If there are any others they have escaped our attention. Certainly the list is complete enough to illustrate the conflict of decisions and the necessity, in the public interest, of having this question of admiralty jurisdiction settled. The more so, since, as was foreseen in the *Nippon Case*, industries and commerce, and the consequent use of submarine cables throughout the country are constantly increasing, with resultant increasing frequency of cable damage from ships' anchors. Another reason for this Honorable Court's deciding the question, and deciding it in favor of the admiralty jurisdiction, is, that with the huge fleet of Government vessels now operating as merchant ships, cable damage is, more often than not, done by the anchors of one of these Government owned ships, and unless the cable owner can sue the United States under the Suits in Admiralty Act, he is entirely without redress. He can not sue in the Court

of Claims, nor under the Tucker Act, since tort cases are not there entertained. His only chance of recovery, short of a special act of Congress, is to sue in the admiralty courts under the Suits in Admiralty Act, where the Government has consented to be sued.

The conflict in the decisions is positive and outright. We do not believe that this court will approve any such hairline distinction as that suggested between a telegraph or telephone cable and a power cable. It is certainly pretty tenuous to say that because a telephone cable may, among other messages, some times carry messages of maritime import, that it thereby comes under the jurisdiction, while another telephone cable (or power cable), which carried no such message would not be under the jurisdiction. If that distinction prevailed, then a power cable of a public utility, like petitioner, which supplied electricity to a telephone company for transmitting messages relating, among others to maritime import, or which furnished electricity to light a beacon on a dolphin or the lights on a pier (which almost all power cables of a public utility supplying a municipal seaport do), or even the power to operate loading cranes on a dock, would be within the jurisdiction; but one which did not, would be without. The distinction is entirely too fine spun. The plain and indisputable fact, as has been held in the New York cases, is that the cable is not a *structure* on land. It lies loosely on the bed of the river. It has, purposely, so much slack that it

can be lifted to the surface and laid across barges for examination or repair. At the time it is damaged, it is not even on the bottom but lifted up and dragged therefrom by the ship's anchor, so it is actually in the water, as was pointed out in *Postal Telegraph Cable Co. vs. Ross*, supra: "The result of the force exerted by the anchor must have been to have raised the cable from the bed of the channel, and to have dragged it along through the water. The accident, therefore, occurred within the physical limits of admiralty jurisdiction," etc. The cable is not fastened to the land as a pile driven into the river bed. It merely has electrical connections on the bank connecting it with the land cable, which is of a different character. It is, as was said in *Bell Telephone Case*, supra, "an adjunct to, rather than a prolongation or extension of, a structure on land".

As the New York cases have pointed out, all the elements of admiralty jurisdiction are present. The tort is committed by a ship. In navigable water. The actual rupture of the cable, and damages, take place in navigable water. The cable itself is in such water, and not solid or fixed in place, and no more attached to the land than is a vessel tied up to a bank. In short, it is not a *land structure*.

This seems plain. But in view of the conflict of opinion between the courts, the question should, in the public interest, be settled; and we respectfully pray that your Honorable Court will issue its writ

of certiorari to the United States Court of Appeals
for the 9th Circuit.

Respectfully submitted,

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